SUPREME COURT OF APPEALS OF VIRGINIA.

KAIN *et al. v.* ANGLE.

Nov. 17, 1910.

[69 S. E. 355.]

1. Witnesses (§ 48*)—Competency.—A witness convicted of a fraud on the revenue laws, and sentenced to confinement in a United States penitentiary by a federal court sitting in Virginia, was not thereby disqualified from testifying in one of the state courts; the federal statutes expressly limiting the disqualification to giving testimony in a federal court, and the Virginia statutes being intended only to disqualify persons convicted of perjury in the courts of the state.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 109; Dec. Dig. § 48.*]

2. Trial (§ 233*)—Instruction—Theory of Cause.—Plaintiff and defendant are each entitled to have their view of the case presented to the jury by proper instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 527; Dec. Dig. § 233.*]

3. Evidence (§ 213*)—Compromise—Instruction.—An independent admission of a fact is not to be excluded merely because it was made in an effort to compromise and adjust differences.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 751; Dec. Dig. § 213.*]

4. Corporations (§ 156*)—"Preferred Stock"—"Preferred Dividend."—Preferred stock in a corporation is that entitling the holder to dividends from earnings before the common stock can receive a dividend therefrom. The relation of debtor and creditor, however, does not exist between the preferred stockholders and the corporation, as to any right to a preferred or guaranteed dividend until the dividend is declared; the preferred dividend being nothing more than money paid out of profits by a corporation to one class of shareholders in priority to that to be paid to another class.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 581-583, 593-603; Dec. Dig. § 156.*

For other definitions, see Words and Phrases, vol. 6, p. 5500.]

5. Corporations (§ 121*)—Stock—Amount—Representation—Fraud—Question for Jury.—Where plaintiff contracted to sell defendant 60 per cent. of the common stock of a corporation, and represented that the entire capital stock of the company consisted of 500 shares of common stock, and, in fact, there were 39 shares of preferred stock outstanding, whether such representation was fraudulent, so as to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

entitle defendant to a deduction from the price for such preferred stock, was for the jury.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 121.*]

6. Judgment (§ 248*)—Conformity to Pleadings.—Where plaintiff, after suing in his own name amended his declaration, by inserting after his name "who sues as attorney in fact for the benefit of J. H. Pigg and others," and the judgment entered on a verdict for plaintiff recited that plaintiff "who sues for the benefit of J. H. Pigg and others," should recover, etc., such amendment, though objectionable in form, was not a fatal defect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 439; Dec. Dig. § 248.*]

Error to Corporation Court of Roanoke.

Action by T. M. Angle, suing for the benefit of J. H. Pigg and others, against P. J. Kain and others. Judgment for plaintiff, and defendants bring error. Reversed.

KEITH, P. T. M. Angle, suing for the benefit of Pigg and others, filed a declaration in assumpsit which contains the common counts and a special count, from which it appears that he sold to Hagan, Kain, and Simpson 60 per cent. of the common stock of the Casper Company, Inc., —— shares of which he agreed to deliver at once or within a few days, and the other 85 shares, which were then held by the American Distilling Company to secure a debt of $6,500 due irom the plaintiff to said company, were to be redeemed and delivered to the defendants within two years from the 1st day of January, 1908; that he further agreed to convey to O. F. Hagan at once or within a few days from the date of the sale of said stock certain real estate, upon which there were liens amounting in the aggregate to $41,000, 21 monthly notes due the Columbia Trust Company for $204.17 each; three six-month notes to John McCarthy for $500 each; one four-month note to City National Bank for $5,000; and one note to Rada Pigg for $30.000, all of which were secured by deeds of trust upon the property, and he further agreed to give possession of said real estate at once or within a few days after the purchase, and that, in consideration of the delivery of said stock and the conveyance of said real estate, the defendants promised and agreed to pay to the plaintiff $60.000; that about $41.000 evidenced by the above-mentioned liens the defendants agreed to assume and to pay for plaintiff as the same became due, $6,500 due the American Distillery Company upon the delivery to them by the plaintiff of the 85 shares of stock pledged as security, and the balance of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

$12,387.47 in cash. The plaintiff further avers that, in pursuance of said agreement, he did deliver to the defendants the shares of stock which under this agreement were to be delivered and they were accepted by the defendants, and that he did sign and deliver a deed conveying the real estate to them, and turned over and delivered to them the distillery plant and real estate, in accordance with the agreement, and the defendants then and there paid to him upon the cash payment then due the sum of $3,036.49, but refused to pay the residue in accordance with the plaintiff's demand.

The defendants appeared in answer to this suit, and filed the following paper:

"The defendants deny that the plaintiff was at the time in the declaration mentioned the owner of any shares of the stock of the Casper Company, Inc., and deny each and every allegation of the plaintiff's declaration." This may perhaps be taken as the equivalent of the plea of nonassumpsit.

It is further set out in this paper that the plaintiff "falsely and fraudulently represented to defendants that the entire capital stock of the Casper Company, Inc., consisted of 500 shares of common stock, and that the debts of said company at the time in the declaration mentioned, exclusive of the liens on its real estate, would not exceed the amounts owing to said company, while as a matter of fact the company had issued 500 shares of capital stock and 39 shares of preferred stock, and the indebtedness of the company (exclusive of the liens on its real estate) exceeded the amounts owing to it by about $6,000;" that "T. M. Angle sold and agreed to deliver to the defendant 60 per cent. of the entire plant and property of the Casper Company, Inc., at the price of $60,000, and in making the sale it was agreed between the parties that the solvent accounts payable to the Casper Company should balance or be equal to the accounts payable by it, and the transaction was consummated by the delivery to the defendants of 60 per cent. of the common stock of the Casper Company, it being represented to defendants that the entire outstanding capital stock of the Casper Company was $50,000 or 500 shares;" and that, "after the transaction was closed in the manner above set forth, the defendants discovered that there was about $3,900 of preferred stock issued and outstanding, and that the accounts owing by the Casper Company exceeded the amounts owing to it by $6,000, and the defendants are damaged by reason thereof $12,000."

The case was submitted to a jury, who were sworn "to speak upon the issue joined," and, having heard the evidence, they found a verdict in favor of the plaintiff for $4,980.75. Upon

this judgment was entered; to which a writ of error was awarded.

The first error assigned is to the admission of the deposition of T. M. Angle, whose competency as a witness was objected to because he had been convicted of a fraud upon the federal revenue laws and sentence to confinement in the United States penitentiary at Atlanta, Ga., by the United States Court for the Western District of Virginia.

This assignment seems to be disposed of by the decision of this court in Samuels v. Commonwealth, 110 Va. 901, 66 S. E. 222, where it was held that a witness convicted of perjury in a United States court sitting in this state is not thereby disqualified from testifying in one of the courts of this state. The federal statute expressly limits the disqualification to giving testimony in any court of the United States and the Virginia statute intended only to disqualify persons convicted of perjury in a court of this state.

Objection was taken to the giving of certain instructions, Nos. 1, 2, 3, and 5. The plaintiffs in error concede that they correctly state the law, but object to them upon the ground that they are based upon the theory that there was a warranty, and that they entirely ignored evidence of the defendants.

We have frequently held that the plaintiff and defendant are each entitled to have his view of the case presented to the jury by proper instructions. The instructions objected to present the case for the plaintiff, and the objection to them is not well founded.

Instruction No. 4 asked for the plaintiff is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff, Angle, promised or agreed to make the accounts receivable and the accounts payable of the Casper Company balance, and that such promise or agreement was made by him in an effort to compromise and adjust the matters in dispute between him and the defendants, then they shall not regard said promise or agreement as evidence against him in this case."

We think instruction No. 4 states the proposition too broadly, for, as was held in C. & O. Ry. Co. v. Stock, 104 Va. 97, 51 S. E. 161, quoting with approval from 1 Greenleaf (16th Ed.) § 192, "it should have been received, if it was an independent admission of a fact, merely because it was a fact."

The plaintiffs in error asked for four instructions, the first of which the court gave, and refused to give the second, third, and fourth.

The second instruction is as follows: "The court instructs the jury that if they believe from the evidence that the defend-

ants agreed to pay $60,000 for 60 per cent. of the entire property of the Casper Company, Inc., and that out of the purchase money all of the debts of the company were to be paid and the balance of the $60,000 was to be paid in cash, and that Angle furnished a statement of the debts so that such settlement could be made and it was made, but that in making such settlement it was ascertained that there was certain preferred stock which the defendants did not acquire, and they retained out of the purchase the value of said preferred stock and paid the plaintiff the balance then found due, then they must find for the defendant."

Defendants in error sold, and plaintiffs in error bought, 60 per cent. of the common stock of the Casper Company, and it appears that, in addition to the common stock, there were 39 shares of preferred stock, and preferred stock does not come within the description of either "common stock," as stated in the declaration, or of "capital stock," as described in the statement of defense. It entitles the holder however, to receive dividends, from the earnings of the company before the common stock can receive a dividend from such earnings. "In other words, it is stock entitled to dividends from the income or earnings of the corporation before any other dividend can be paid. The relation of debtor and creditor does not exist between the preferred stockholders and the corporation, and the right to a preferred or guaranteed dividend is not a debt until the dividend is cleared. A dividend is money paid out of profits by a corporation to its shareholders. A preferred dividend is nothing more than that which is paid to one class of shareholders in priority to that to be paid to another class." Cook on Stock & Stockholders (3d Ed.) § 267.

The representation that there were 500 shares of common stock, of which the defendants purchased 60 per cent., would certainly be false if it appears that there were 539 shares of common stock. The defendants are in a worse position if there were in addition to the 500 shares of common stock 39 shares of preferred stock, for the 39 shares of preferred stock are entitled to their dividend before anything is paid on the common stock, while, if the excess of stock over that which was represented had been common stock, the 39 shares would have received their dividend pari passu with the 500 shares. There is evidence to support the theory of plaintiffs in error, and the question should have been submitted to the jury by proper instructions to enable them to say whether or not a credit should have been allowed the defendants on their purchase price for the 39 shares of preferred stock.

After the jury had rendered their verdict, the plaintiffs in er-

ror moved in arrest of judgment upon the ground that just before the trial commenced the plaintiff amended his declaration by inserting after his name, "T. M. Angle," the words, "who sues as attorney in fact" for the benefit of J. H. Pigg and others; the contention being that a plaintiff cannot maintain a suit as attorney in fact for another, that plaintiffs must sue in their own names, that no judgment could be properly pronounced or entered in such a suit, and that when T. M. Angle amended his suit so as to change his character from a plaintiff to that of an attorney in fact for another he amended himself out of court, and for the further reason that no judgment entered by this court would be a bar to a suit by T. M. Angle in his own right, or by those for whom he claimed to act as attorney in fact.

It is conceded by plaintiffs in error that, if the pleader had amended his declaration so as to show that while T. M. Angle was the nominal plaintiff he sued for the benefit of another, such declaration would be good. From the judgment in the case it appears that that was the view taken by the corporation court, for the judgment entered upon the verdict recites that T. M. Angle, who sues for the benefit of J. H. Pigg and others, shall have and recover of the defendants the sum of $4,980, the amount ascertained against them by the verdict of the jury aforesaid.

As the case has to be reversed for the reasons already given, the court can amend the declaration by striking out the phrase to which plaintiffs in error object.

Upon the whole case, we are of opinion that the judgment which may not arise upon another trial, and are not of sufficient importance to demand further consideration.

Upon the whole case, we are of opinion that the judgment should be reversed and the cause remanded to the corporation court for a new trial to be had in accordance with the views herein announced.

Reversed